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DOES IT PAY TO BE A MANAGER? THE SIGNIFICANCE OF THE MANAGER RULE IN ANALYZING RETALIATION CLAIMS UNDER TITLE VII

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INTRODUCTION

Retaliation by employers in the workforce is a recurring issue in today's society. Retaliation claims in the workplace are becoming more frequent and common. According to the Equal Employment Opportunity Commission ("EEOC"), the number of retaliation charges filed annually with the agency has grown considerably, with approximately 22.6% of EEOC charge filings in the 1997 fiscal year to 44.5% in the 2015 fiscal year being retaliation based.¹

Congress enacted Title VII of the Civil Rights Act of 1964 ("Title VII") to protect employees in the workplace "from discrimination and retaliation on the basis of certain protected statuses."² However, the question remains whether employees who serve in a managerial role engage in a protected activity under Title VII when they oppose the actions of their employer in the normal course of their job responsibilities.

Courts are split on whether employees must step outside their role as managers and assert their own adverse employment action against their employer to have engaged in protected activity under Title VII.³ This requirement is known as the

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¹ *Charge Statistics FY 1997 Through FY 2015*, U.S. EQUAL OPPORTUNITY EMP'T COMM'N, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Dec. 20, 2017).

² LISA J. BANKS & SAM KRAMER, A.L.I., *Emerging Issues in Anti-Discrimination Law*, SX021 ALI-CLE 275 § 1 (2016).

³ *Compare* *DeMasters v. Carilion Clinic*, 796 F.3d 409 (4th Cir. 2015) (holding that the manager rule does not apply to Title VII claims), *with* *Brush v. Sears*

“manager rule.”⁴ The question of whether to apply the manager rule to retaliation claims under Title VII is significant because it will determine whether employees will be discouraged from bringing such claims or will feel empowered to do so; whether employees will face a challenge in bringing a claim;⁵ or whether employers will be bombarded with a plethora of claims.⁶

In 2015, the United States Court of Appeals for the Fourth Circuit issued an opinion on the manager rule as it applies to Title VII that created a circuit split with a 2012 decision by the United States Court of Appeals for the Eleventh Circuit.⁷ In *DeMasters v. Carilion Clinic*, the Fourth Circuit held that the “‘manager rule’ has no place in Title VII jurisprudence.”⁸ Basing its reasoning on the differing language between the Fair Labor Standards Act (“FLSA”) and Title VII, as well as Supreme Court precedent, the court refused to apply the manager rule in the Title VII context.⁹ But, in *Brush v. Sears Holdings Corp.*, the Eleventh Circuit found the manager rule, as defined in the FLSA context in *McKenzie v. Renberg’s Inc.*,¹⁰ persuasive and applied it against certain individuals trying to recover under Title VII.¹¹

This Note argues that the manager rule should be applied to Title VII cases but in a new and very specific and detailed context involving a case-by-case analysis, similar to that of the United States Court of Appeals for the Ninth Circuit’s reasoning in *Rosenfield v. GlobalTranz Enterprises, Inc.* This Note is comprised of three parts. Part I provides the history of Title VII generally, and discusses the emergence of the manager rule in the FLSA context. Part II addresses how different federal circuit

Holdings Corp., 466 F. App’x 781 (11th Cir. 2012) (holding that the manager rule applies to Title VII claims and employees must cross the line from being an employee completing her normal responsibilities to an employee filing a personal complaint against her employer).

⁴ *McKenzie v. Renberg’s Inc.*, 94 F.3d 1478, 1486 (10th Cir. 1996).

⁵ *DeMasters*, 796 F.3d at 423 (“First, under the balancing test adopted by this Circuit . . . an employer may not be liable under Title VII if an employee’s conduct at work is sufficiently ‘insubordinate, disruptive, or nonproductive.’ . . . Second, the Supreme Court has provided employers with an affirmative defense under certain circumstances when an employee fails to report and to take advantage of an employer’s internal investigation processes.”).

⁶ *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 628 (5th Cir. 2008).

⁷ Compare *DeMasters*, 796 F.3d at 424, with *Brush*, 466 F. App’x at 787.

⁸ *DeMasters*, 796 F.3d at 413.

⁹ *Id.* at 422–24.

¹⁰ *McKenzie v. Renberg’s Inc.*, 94 F.3d 1478, 1486 (10th Cir. 1996).

¹¹ *Brush*, 466 F. App’x at 787.

courts have either recognized or rejected the manager rule as it applies to retaliation claims in the Title VII context. Part III discusses the benefits and drawbacks of the manager rule and proposes a solution that the manager rule should be applied to Title VII cases using a case-by-case analysis similar to that of the Ninth Circuit's reasoning in *Rosenfield*.

I. THE HISTORY OF TITLE VII AND THE DEVELOPMENT OF THE MANAGER RULE

A. *Legal Background of Title VII*

Title VII is a federal law created to “protect[] employees from discrimination and retaliation on the basis of certain protected statuses.”¹² The anti-retaliation provision of Title VII, § 704(a), provides that:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing

Within the anti-retaliation provision are two different clauses that are important to distinguish: the oppositional clause and the participatory clause.¹³ Oppositional activity involves opposing one of the practices that is “made an unlawful employment practice by Title VII,” while participatory activity involves participating in “any manner in an investigation, proceeding, or hearing under Title VII.”¹⁴ The two clauses offer different amounts of statutory protection.¹⁵

In general, to establish a *prima facie* claim for retaliation under Title VII, a plaintiff must show the following: “(1) that [he] engaged in a protected activity, as well as (2) that [his] employer took an adverse employment action against [him], and (3) that

¹² BANKS & KRAMER, A.L.I., *supra* note 2, § 1.

¹³ Mark J. Oberti, *New Wave of Employment Retaliation and Whistleblowing*, 38 T. MARSHALL L. REV. 43, 66–67 (2012).

¹⁴ Robinson v. Se. Pa. Transp. Auth., 982 F.2d 892, 896 n.4 (3d Cir. 1993).

¹⁵ Oberti, *supra* note 13, at 67; *see also* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006) (“Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act’s primary objective depends.”).

there was a causal link between the two events.”¹⁶ Specifically, to be protected under the oppositional clause, a plaintiff must demonstrate that he opposed a practice that formed the statutorily prohibited discrimination.¹⁷ A plaintiff can still receive the protection of the statute without showing that the practice he opposed was definitively a violation of the statute.¹⁸ A plaintiff's opposition to the unlawful conduct need only be based on a reasonable and good-faith belief that the practice violated the statute.¹⁹ Therefore, a plaintiff's opposition will not be protected by the statute if a court finds the belief to be “objectively unreasonable” or the plaintiff does not “honestly believe” that a practice he is opposing is prohibited by statute.²⁰

The United States Supreme Court case, *Burlington Northern & Santa Fe Railway Co. v. White*, is the seminal case that provides guidance on the anti-retaliation provision of Title VII.²¹ In *Burlington*, the plaintiff, a female who was hired as a track laborer,²² claimed that her employer retaliated against her in violation of Title VII when her job responsibilities were changed and when she was suspended for thirty-seven days without back pay.²³ The Supreme Court held that the anti-retaliation provision of Title VII is not solely limited to workplace conduct.²⁴ Additionally, the Court held that a plaintiff must demonstrate

¹⁶ *DeMasters v. Carilion Clinic*, 796 F.3d 409, 416 (4th Cir. 2015) (internal quotation marks and citation omitted).

¹⁷ *O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 631 (7th Cir. 2011); *see also* *Oberti*, *supra* note 13, at 67.

¹⁸ *O'Leary*, 657 F.3d at 631.

¹⁹ *Id.*

²⁰ *Id.*; *see also* *Oberti*, *supra* note 13, at 67.

²¹ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006); *see also* David Long-Daniels & Peter N. Hall, *Risky Business: Litigating Retaliation Claims*, 28 A.B.A. SEC. LAB. & EMP. L. 437, 439 (2013) (“For the last six years, the Supreme Court’s decision in *Burlington Northern & Santa Fe Railway Co. v. White* has been synonymous with Title VII retaliation.”).

²² *Burlington*, 548 U.S. at 57.

²³ *Id.* at 59. She was suspended because her immediate supervisor claimed that she was being insubordinate. However, her company later determined that she had not been insubordinate and reinstated her to her position and awarded her backpay for the thirty-seven days she was suspended. Subsequently, she filed a retaliation charge based on her suspension. *Id.* at 58–59.

²⁴ *Id.* at 67 (“The scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.”); *see also* Long-Daniels & Hall, *supra* note 21, at 440 (“The Supreme Court first reasoned that retaliation claims, unlike discrimination claims, are not limited to workplace conduct.”).

that “a reasonable employee would have found the challenged action materially adverse, ‘which in this context means it well might have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” ’ ”²⁵ Therefore, under this broad interpretation of the anti-retaliation provision, a plaintiff can successfully assert a claim of retaliation under Title VII so long as the purported action would have dissuaded a reasonable worker from making or supporting a charge of discrimination.²⁶

The Supreme Court in *Crawford v. Metropolitan Government of Nashville & Davidson County*²⁷ discussed whether the protection of the anti-retaliation provision of Title VII applies to an employee who does not voluntarily discuss the issue of discrimination, but rather does so while answering questions during an employer’s internal investigation.²⁸ In that case, the plaintiff, who was an employee of a school district, did not necessarily have any managerial responsibilities.²⁹ The plaintiff was asked by a human resources officer whether she had on any occasion witnessed inappropriate behavior of another employee.³⁰ After describing situations in which she did witness several instances of sexually harassing behavior, the plaintiff was fired.³¹ Thereafter, the plaintiff filed a retaliation claim under Title VII, arguing that her employer fired her for reporting the behavior during the internal investigation.³²

The Supreme Court held that the protection of the anti-retaliation provision of Title VII does extend to an employee who discusses an issue of discrimination while answering questions during an employer’s internal investigation.³³ To arrive at this conclusion, the Court looked at the definition of “oppose” within the statute and applied its ordinary meaning, which is “to resist

²⁵ *Burlington*, 548 U.S. at 68 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

²⁶ *Id.* at 69–70 (“By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff’s position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.”).

²⁷ 555 U.S. 271 (2009).

²⁸ *Id.* at 273.

²⁹ *Id.* at 274.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 273.

or antagonize . . . ; to contend against; to confront; resist; withstand.”³⁴ According to the Court, the plaintiff’s descriptions of the employee’s behavior would qualify as “resistant” or “antagonistic.”³⁵ Essentially, “[w]hen an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication virtually always constitutes the employee’s opposition to the activity.”³⁶ One does not have to be active to oppose an action or behavior.³⁷

Therefore, the plaintiff’s conduct of reporting the discrimination to her boss during questioning rather than on her own initiative was considered opposition and was covered by the clause.³⁸ According to the Court, there is nothing in the statute that would require “a freakish rule” that would protect an employee who voluntarily reports discrimination but not one who reports the discrimination when asked a question.³⁹ There is nothing in the statute’s text or precedent that supports the “catch-22” of the employer punishing the employee for reporting the discrimination or having the employer “escape liability [by] arguing that it exercised reasonable care to prevent and correct [any discrimination] promptly but the . . . employee unreasonably failed to take advantage of . . . preventive or corrective opportunities provided by the employer.”⁴⁰

³⁴ *Id.* at 276 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d ed. 1957)).

³⁵ *Id.*

³⁶ *Id.* (emphasis and internal quotation marks omitted).

³⁷ *Id.* at 277 (“‘Oppose’ goes beyond ‘active, consistent’ behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it.”).

³⁸ *Id.* at 280; see also Deborah L. Brake, *Retaliation in the EEO Office*, 50 TULSA L. REV. 1, 14 (2014) [hereinafter *Retaliation in EEO Office*] (“While the Court’s decision was essential to protect the rights of employee-witnesses in internal investigations, it does nothing for the employees charged with responsibility for handling the investigation.”).

³⁹ *Crawford*, 555 U.S. at 277–78; see also Deborah L. Brake, *Tortifying Retaliation: Protected Activity at the Intersection of Fault, Duty, and Causation*, 75 OHIO ST. L.J. 1375, 1409–10 (2014) [hereinafter *Tortifying Retaliation*] (“Calling the rule proposed by the employer ‘freakish,’ the Court exhibited sensitivity to the unfairness of a legal framework that would reward employers for adopting anti-discrimination policies but allow them to retaliate against the employees who participate in them.”).

⁴⁰ *Crawford*, 555 U.S. at 279 (internal quotation marks omitted).

B. The Emergence of the “Manager Rule”

The emergence of the “manager rule” has become a contested issue in the retaliation context. The manager rule was first introduced under retaliation claims in the Fair Labor Standards Act context.⁴¹ Under the FLSA, it is unlawful for any person:

[T]o discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.⁴²

According to the manager rule, an employee who is involved in management does not engage in a “protected activity” when he or she contests or differs in opinion with the actions of his or her employer.⁴³ To qualify as engaging in protected activity, an employee must “cross the line from being an employee ‘performing her job . . . to an employee lodging a personal complaint.’”⁴⁴

The leading case showing how the manager rule is used to limit the scope of protected activity is *McKenzie v. Renberg’s Inc.*, a Tenth Circuit FLSA case decided in 1996.⁴⁵ The plaintiff, a personnel director responsible for, among other things, monitoring compliance with wage and hour laws, filed suit against her employer.⁴⁶ She asserted an FLSA retaliatory

⁴¹ *McKenzie v. Renberg’s Inc.*, 94 F.3d 1478, 1486–87 (10th Cir. 1996).

⁴² 29 U.S.C. § 215(a)(3) (2012).

⁴³ *Brush v. Sears Holdings Corp.*, 466 F. App’x 781, 787 (11th Cir. 2012) (quoting *McKenzie*, 94 F.3d at 1478).

⁴⁴ *Id.*; see also Colin R. Hagan, *Client Update: “Manager Rule” Not the Rule in Fourth Circuit*, SHLANSKY LAW GROUP (July 1, 2014), http://www.slglawfirm.com/Assets/ManagerRule_20140701.pdf.

The “manager rule” gives employers an increasingly-recognized defense against discrimination or retaliation claims based on facts that suggest the employee was doing his or her job. Employees are on notice that they must register some personal opposition to the employment practice at issue by participating in the identification or investigation of discrimination when it is not within their job description to do so, or expressing some disapproval of an employment practice. In courts that apply the “manager rule,” it is often not enough for a plaintiff to relay only the complaint of another employee, especially if the plaintiff is a manager, who might be the first person to whom an employee’s complaints are aired.

⁴⁵ *McKenzie v. Renberg’s Inc.*, 94 F.3d 1478 (10th Cir. 1996); see also *Retaliation in EEO Office*, *supra* note 38, at 17.

⁴⁶ *McKenzie*, 94 F.3d at 1481.

discharge claim for being terminated after reporting possible company FLSA violations.⁴⁷ The Tenth Circuit rejected plaintiff's retaliation claim on the ground that she was acting within her job responsibilities.⁴⁸ According to the court, the plaintiff did not initiate a FLSA claim on her own behalf or on behalf of anyone else but rather only informed the company that others might institute FLSA claims against it.⁴⁹ The court explained that for the plaintiff to be protected from retaliation, she must "step outside . . . her role of representing the company and either file (or threaten to file) an action adverse to the employer."⁵⁰ Because plaintiff was merely performing her job requirements by monitoring wage and hour issues, she did not step outside of her role and thus was not protected under the statute.⁵¹

The Fifth Circuit in *Hagan v. Echostar Satellite, L.L.C.*,⁵² adopted the manager rule and also applied it in the FLSA context.⁵³ In *Hagan*, the plaintiff was a field service manager who was in charge of a group of technicians.⁵⁴ After the plaintiff was terminated, he filed a claim against his employer that he was retaliated against in violation of the anti-retaliation provisions of the FLSA.⁵⁵ Specifically, the plaintiff argued that he was retaliated against for personally opposing a change to the field technicians' schedule because it would possibly reduce their overtime pay.⁵⁶ The plaintiff also argued that he was retaliated against for forwarding his technicians' questions to the Human Resources department on whether the change in schedule was legal or not.⁵⁷

The Fifth Circuit relied on *McKenzie v. Renberg's Inc.* and held that the plaintiff did not "step outside the role of manager" when he passed along his technicians' question to the Human Resources department about the legality of the schedule change, and his actions were therefore not considered protected activity.⁵⁸

⁴⁷ *Id.*

⁴⁸ *Id.* at 1487.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1486.

⁵¹ *Id.* at 1487.

⁵² 529 F.3d 617 (5th Cir. 2008).

⁵³ *Id.* at 627–28.

⁵⁴ *Id.* at 620.

⁵⁵ *Id.* at 623.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 630.

The Fifth Circuit took the position that without the manager rule, almost all of the activities that a manager performs during the course of his employment would be considered protected activity.⁵⁹ Without the manager rule, a normal at-will employment relationship could result in a “litigation minefield.”⁶⁰

The first appearance of the manager rule in the Title VII context occurred in the Eighth Circuit case, *EEOC v. HBE Corp.*⁶¹ One of the plaintiffs had been a director of personnel for a hotel corporation.⁶² When the corporate director of personnel asked the plaintiff to fire another employee, the plaintiff refused because he believed the decision to fire the employee was racially motivated.⁶³ Subsequently, the plaintiff was discharged and filed complaints with the EEOC, which decided to file a lawsuit under Title VII on the plaintiff's behalf.⁶⁴ After a jury award for the plaintiff,⁶⁵ the employer argued on appeal that the plaintiff did not step outside his normal responsibilities in opposing the discharge of the other employee.⁶⁶ The court looked to the language of *McKenzie*⁶⁷ to decide whether the plaintiff “‘step[ped] outside’ his employment role.”⁶⁸ The court recognized that “stepping outside” one's normal employment role entails taking “some action against a discrimination policy.”⁶⁹ The court then distinguished the actions of the plaintiff in *McKenzie* from the plaintiff's actions.⁷⁰ The court held that the plaintiff “stepped outside” his normal managerial role by refusing to implement a

⁵⁹ *Id.* at 628 (“If we did not require an employee to ‘step outside the role’ or otherwise make clear to the employer that the employee was taking a position adverse to the employer, nearly every activity in the normal course of a manager's job would potentially be protected activity under Section 215(a)(3).”).

⁶⁰ *Id.* “[G]roups of employees—management employees, human resources employees, and legal employees, to name a few—[would] be[] difficult to discharge without fear of a lawsuit.” *Id.*

⁶¹ 135 F.3d 543, 554 (8th Cir. 1998).

⁶² *Id.* at 549.

⁶³ *Id.* at 550.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 554.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

discriminatory company policy, whereas the plaintiff in *McKenzie* only notified management of possible violations of the law so that the company would not face liability.⁷¹

II. DIFFERENT CIRCUIT COURT OPINIONS ON THE APPLICATION OF THE “MANAGER RULE” TO TITLE VII RETALIATION CLAIMS

The Equal Employment Opportunity Commission and many courts have rejected the applications of the manager rule. The EEOC has opined on the application of the manager rule in its newly proposed enforcement guidance on retaliation and related issues.⁷² It concludes that the manager rule has no place in relation to the opposition clause of Title VII.⁷³ According to the EEOC, “Opposition encompasses employee exposure of, and objection to, perceived discrimination, even when those who engage in the opposition are managers, human resources personnel or other internal EEO compliance advisors to an employer.”⁷⁴ Some examples of protected opposition offered by the EEOC include:

[C]omplaining about alleged discrimination against oneself or others, or threatening to complain; providing information in an employer’s internal investigation of an EEO matter; refusing to obey an order reasonably believed to be discriminatory; advising an employer on EEO compliance; resisting sexual advances or intervening to protect others; passive resistance (allowing others to express opposition); and requesting reasonable accommodation for disability or religion.⁷⁵

⁷¹ *Id.*; see also *Retaliation in EEO Office*, *supra* note 38, at 25 (discussing how the court in *EEOC v. HBE Corp.* “manipulate[d] the employer ‘policy’ in order to find that the plaintiff acted . . . in ‘opposition’ to the employer . . . However, the court did not acknowledge that its analysis turned on what it credited as the company ‘policy’—the written nondiscrimination policy, which the plaintiff acted to further, or the allegedly discriminatory actions taken by high-level employees (and in violation of the official nondiscrimination policy) which the plaintiff opposed.”).

⁷² See generally U.S. Equal Emp. Opportunity Comm’n, Proposed Enforcement Guide on Retaliation and Related Issues (Jan. 21, 2016), <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>.

⁷³ *Id.* at 13. (“The EEOC and the U.S. Department of Labor have rejected the so-called ‘manager rule’ adopted by some courts . . .”).

⁷⁴ *Id.*

⁷⁵ *Id.* at 25.

The EEOC defines the scope of the protection of the opposition clause by stating that the “manner of opposition be reasonable” and that the opposition must be based on a “reasonable and good faith belief that the opposed practice is unlawful.”⁷⁶

The federal circuit courts apply the manager rule in an inconsistent manner. The Fourth, Second, and Sixth Circuits have explicitly rejected the application of the manager rule to Title VII cases.⁷⁷ Conversely, in unpublished opinions, the Tenth and Eleventh Circuits have openly accepted the manager rule and applied it in Title VII cases.⁷⁸

A. *The Rejection of the Manager Rule*

The Fourth Circuit in *DeMasters v. Carilion Clinic* rejected applying the manager rule to Title VII cases.⁷⁹ In that case, an employee informed the plaintiff that he had been harassed in the workplace and the plaintiff offered his opinion that the employee was a victim of sexual harassment and assisted the employee with the reporting and investigation.⁸⁰ After the employee complained that the employer was not handling the situation properly, the plaintiff believed that the management and human resources (“HR”) department had been mishandling the employee’s complaints and contacted the HR manager to relay his opinion.⁸¹ After the employee filed a Title VII complaint against the employer and during settlement negotiations, the plaintiff was terminated because he had not acted in the best interests of the company when handling the employee’s sexual harassment complaints.⁸² The plaintiff then filed a complaint alleging that the defendant terminated his employment in violation of Title VII’s opposition clause.⁸³

⁷⁶ *Id.* at 16.

⁷⁷ See *DeMasters v. Carilion Clinic*, 796 F.3d 409, 424 (4th Cir. 2015); *Littlejohn v. City of New York*, 795 F.3d 297, 318 (2d Cir. 2015); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 577 (6th Cir. 2000).

⁷⁸ See *Brush v. Sears Holdings Corp.*, 466 F. App’x 781, 787 (11th Cir. 2012); *Weeks v. Kansas*, 503 F. App’x 640, 642 (10th Cir. 2012).

⁷⁹ See *DeMasters*, 796 F.3d at 424.

⁸⁰ *Id.* at 413.

⁸¹ *Id.* at 414.

⁸² *Id.*

⁸³ *Id.* at 415.

The Fourth Circuit held that the manager rule does not apply to Title VII claims.⁸⁴ Specifically, the Fourth Circuit analyzed the difference between the FLSA anti-retaliation provision and the Title VII opposition clause, noting that the FLSA “is far more constricted than the broad range of conduct protected by Title VII’s anti-retaliation provision.”⁸⁵ Also, the court reasoned that Supreme Court precedent goes against restricting the coverage of Title VII’s anti-retaliation provision,⁸⁶ and there was never an “endorse[ment] [of] a categorical exception based on an employee’s workplace duties.”⁸⁷ Additionally, the court analyzed the affirmative defense that the Supreme Court has provided to employers, known as the *Faragher/Ellerth* defense.⁸⁸ In sum, the court warned that the application of the manager rule in Title VII cases would have employees in a managerial position “receive no protection from Title VII if they oppose discrimination targeted at the employees that they are duty-bound to protect.”⁸⁹

The manager rule was also rejected for Title VII claims by the Second Circuit.⁹⁰ In *Littlejohn v. City of New York*, the plaintiff was a director of the Equal Employment Opportunity Office at the New York City Administration for Children’s Services and conducted investigations of discrimination claims as one of her responsibilities.⁹¹ The plaintiff claimed that she was

⁸⁴ *Id.* at 422.

⁸⁵ *Id.*

⁸⁶ The Supreme Court in *Burlington* held that the anti-retaliation provision of Title VII “provide[s] broad protection from retaliation.” *Id.* at 422 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006)). Additionally the Court in *Crawford* intended the provision to cover various types of conduct where an “employee communicates to an employer the employee’s ‘belief that the employer has engaged in . . . a form of employment discrimination.’” *Id.* (quoting *Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009)).

⁸⁷ *Id.* at 423.

⁸⁸ *Id.*; see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998); *Burlington Indus., v. Ellerth*, 524 U.S. 742, 765 (1998). *Faragher* and *Ellerth* hold “[a]n employer . . . subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with . . . authority over the employee.” *Crawford*, 555 U.S. at 272 (first quoting *Faragher*, 524 U.S. at 807; then quoting *Ellerth*, 524 U.S. at 765). To overcome liability, the employer must show “1) that it acted reasonably to prevent and correct harassment; and 2) that the plaintiff acted unreasonably in failing to prevent or mitigate harm.” *Retaliation in EEO Office*, *supra* note 38, at 4.

⁸⁹ *DeMasters*, 796 F.3d at 423.

⁹⁰ See *Littlejohn v. City of New York*, 795 F.3d 297 (2d Cir. 2015).

⁹¹ *Id.* at 303.

retaliated against because she complained about racial discrimination in the personnel decision-making process during a department merger.⁹²

The Second Circuit held that the plaintiff's employment status did not preclude her from participating in protected activities under the opposition clause of Title VII.⁹³ The court looked at the plain language of Title VII's opposition clause and determined that it "does not distinguish among entry-level employees, managers, and any other type of employee."⁹⁴ The court held that merely "reporting or investigating by itself is not a protected activity under [Title VII's] opposition clause, because merely to convey others' complaints of discrimination is not to oppose practices made unlawful by Title VII."⁹⁵ However, if an employee who is tasked with investigating and reporting complaints of discrimination "actively supports other employees in asserting their Title VII rights or personally complains or is critical about the discriminatory employment practices of her employer, that employee has engaged in a protected activity" under Title VII's opposition clause.⁹⁶

Similarly, the Sixth Circuit in *Johnson v. University of Cincinnati* rejected the application of the manager rule as it applied to Title VII claims.⁹⁷ The plaintiff was the Vice President of Human Resources and Human Relations at the University of Cincinnati,⁹⁸ who claimed that he was retaliated against for his advocacy efforts, on behalf of women and minorities, that were in opposition to his employer's alleged discriminatory employment practices.⁹⁹ The court held that even though the plaintiff had a duty to come forward with his concerns, his actions were still protected under Title VII's opposition clause.¹⁰⁰ Relying on the guidance of the EEOC, according to the court, "the only qualification that is placed upon an employee's invocation of protection from retaliation under Title VII's opposition clause is

⁹² *Id.* at 315.

⁹³ *Id.* at 316.

⁹⁴ *Id.* at 318.

⁹⁵ *Id.*

⁹⁶ *Id.* (quoting *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990) (internal quotation marks omitted)).

⁹⁷ See *Johnson v. Univ. of Cincinnati*, 215 F.3d 561 (6th Cir. 2000).

⁹⁸ *Id.* at 566.

⁹⁹ *Id.* at 579.

¹⁰⁰ *Id.*

that the manner of his opposition must be reasonable.”¹⁰¹ Therefore, the employee’s job status or to whom the complaint is made is insignificant, as long as “the manner of [that] opposition” is “reasonable.”¹⁰²

B. The Application of the Manager Rule

On the other hand, the Tenth and Eleventh Circuits have applied the manager rule to claims under Title VII.¹⁰³ In *Weeks v. Kansas*, the Tenth Circuit applied the manager rule in a case where the plaintiff, a lawyer, believed she was terminated in retaliation under Title VII for reporting two allegations of unlawful termination to her employer and “advis[ing] him to take them seriously.”¹⁰⁴ The court held that for plaintiff to have engaged in protected activity, she “must do more than provide legal advice to her employer on how best to resolve a claim of discrimination asserted by another employee.”¹⁰⁵ The court reiterated the manager rule as described in *McKenzie* that the plaintiff must step outside her role to engage in protected activity under Title VII.¹⁰⁶

In *Brush v. Sears Holdings Corp.*, the Eleventh Circuit also applied the manager rule in a Title VII claim.¹⁰⁷ After a fellow employee reported to plaintiff, a Loss Prevention District Coach, that she had been raped, the plaintiff alerted her employer and

¹⁰¹ *Id.* at 580.

¹⁰² *Id.*

¹⁰³ *Weeks v. Kansas*, 503 F. App’x 640 (10th Cir. 2012); *Brush v. Sears Holdings Corp.*, 466 F. App’x 781 (11th Cir. 2012); *see also* *Correa v. Mana Prods. Inc.*, 550 F. Supp. 2d 319, 322–23, 331 (E.D.N.Y. 2008). In *Correa*, plaintiff was a human resources manager who claimed she was fired in retaliation under Title VII for complaining of her employer’s unlawful discriminatory practices and participating in internal company investigations. *Correa*, 550 F. Supp. 2d at 322. The court reasoned that the plaintiff did not step outside her role as human resource manager and did not file or threaten to file an action against her employer. *Id.* at 331. The plaintiff’s investigation of complaints was a part of her job description and not outside the scope of her employment. *Id.* Therefore, the court held that the plaintiff failed to show that she was engaged in protected activity. *Id.*; *see also* *Retaliation in EEO Office*, *supra* note 38, at 20 (“The *Correa* court’s reasoning gives employers a wide berth to pressure the employees in charge of EEO compliance into discouraging and minimizing complaints, rewarding them when complaints go away and punishing them when they do not.”).

¹⁰⁴ *Weeks*, 503 F. App’x at 641.

¹⁰⁵ *Id.* at 642.

¹⁰⁶ *Id.*

¹⁰⁷ *See* *Brush*, 466 F. App’x at 781.

urged them to notify law enforcement.¹⁰⁸ After the plaintiff's employer refused to report the alleged rape, the plaintiff kept insisting on informing law enforcement, which resulted in her subsequent termination.¹⁰⁹

The plaintiff alleged that she was dismissed in retaliation for opposing the nature of the investigation of the sexual harassment claim.¹¹⁰ The Eleventh Circuit held that the plaintiff's behavior in disagreeing with the way in which her employer conducted an investigation did not constitute protected activity under Title VII.¹¹¹ According to the court, the plaintiff was tasked with conducting an internal investigation and was "neither the aggrieved nor accused party" in the matter.¹¹² The court reasoned that it did not want to extend the reasoning of *Crawford* to "all individuals involved in the investigation of that discrimination, no matter how far distant."¹¹³ *Crawford* involved the reporting of a harassment claim where the reporting occurred during a solicited internal investigation by the employer.¹¹⁴ The case did not comment on whether a third party could use a harassment claim as a foundation for its own action under Title VII.¹¹⁵ The Eleventh Circuit held that the manager rule applied and the plaintiff did not engage in protected activity under Title VII.¹¹⁶ The court held that by informing the employer of the harassment claims, investigating the allegations, and reporting the findings, the plaintiff was merely performing her responsibilities as a manager and did not assert any rights under Title VII or take any adverse actions against her employer

¹⁰⁸ *Id.* at 784.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 786.

¹¹² *Id.*

¹¹³ *Id.* at 787.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 788.

during the investigation.¹¹⁷ “Disagreement with internal procedures does not equate with ‘protected activity’ opposing discriminatory practices.”¹¹⁸

III. BENEFITS AND DRAWBACKS OF THE MANAGER RULE AND A RECOMMENDED SOLUTION

The manager rule should continue to be applied in Title VII cases but in a new and very specific and detailed manner that tracks the Ninth Circuit’s reasoning in the FLSA case *Rosenfield v. GlobalTranz Enterprises, Inc.*¹¹⁹

A. Middle Ground Approach Taken by the Ninth Circuit

The court in *Rosenfield* looked to the Supreme Court’s reasoning in *Kasten v. Saint-Gobain Performance Plastics Corp.* for guidance.¹²⁰ In *Kasten*, the plaintiff claimed that his employer discharged him in an unlawful retaliation for orally complaining to officials about the location of the timeclocks.¹²¹ The plaintiff argued that the location of the timeclocks prevented workers from receiving time credit for the time that they spent putting on and taking off protective work gear.¹²² The question presented to the Supreme Court was “whether an oral complaint of a violation of the [FLSA] is protected conduct under the [FLSA’s] anti-retaliation provision.”¹²³

¹¹⁷ *Id.* at 787; see also *Vidal v. Ramallo Bros. Printing Inc.*, 380 F. Supp. 2d 60, 61–62 (D.P.R. 2005). In *Vidal*, the plaintiff was a human resources director who told his employer that he was investigating sexual harassment complaints made by other employees against the company. *Id.* at 61. That same day, the plaintiff was terminated in what he alleged was retaliation for investigating the complaints. *Id.* The court held that plaintiff did not have a claim under Title VII. The court reasoned that the plaintiff was simply performing his normal job responsibilities and in accordance with his employer’s policies forbidding sexual harassment. *Id.* at 62. The court discussed how the plaintiff’s actions were not considered adverse to his employer and were part of his regular job duties. *Id.* Thus, the plaintiff’s actions were not considered as engaging in protected activity under Title VII. *Id.*

¹¹⁸ *Brush*, 466 F. App’x at 787. “Under such circumstances, the breadth of *Crawford*’s application to individuals who suffered workplace discrimination is not transferable to the entirety of the management string that might review any such allegation.” *Id.* at 787–88.

¹¹⁹ 811 F.3d 282 (9th Cir. 2015).

¹²⁰ See *id.* at 285–88.

¹²¹ *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 5 (2011).

¹²² *Id.* at 4–5.

¹²³ *Id.* at 7 (internal quotation marks omitted).

Answering in the affirmative, the Supreme Court reasoned that Congress did not intend to limit the protection that the FLSA offers and that limiting the provision's coverage to solely written complaints would defeat that objective.¹²⁴ In addition to finding that oral complaints are included in the phrase "filed any complaint" in the FLSA's anti-retaliation provision,¹²⁵ the Supreme Court also established another important ruling about complaints in this context. Although oral complaints are included within the scope of the Act, the Act is also meant "to establish an enforcement system that is fair to employers."¹²⁶ The FLSA contains a fair notice element to employers.¹²⁷ To be considered a valid complaint within the anti-retaliation provision, "a complaint must be sufficiently clear and detailed for a reasonable employer to understand it . . . as an assertion of rights protected by the statute and a call for their protection."¹²⁸

In *Rosenfield*, the plaintiff was the Director of Human Resources and Corporate Training for her employer.¹²⁹ Throughout the plaintiff's employment, she consistently reported to her superiors that the company was not complying with the FLSA, and she sought to change this in order to comply with the statutory requirements of the statute.¹³⁰ The plaintiff was subsequently fired and alleged that her employer fired her because she had engaged in the protected activity under the FLSA of complaining to her superiors about the company's failure to comply with the FLSA.¹³¹

The Ninth Circuit in *Rosenfield* was concerned with whether the managerial status of the plaintiff affected whether her complaint was within the scope of the "filed any complaint" phrase of the anti-retaliation provision of the FLSA.¹³² The Ninth Circuit held that an employee's managerial status "form[s]

¹²⁴ *Id.* at 11.

¹²⁵ *Id.* at 17.

¹²⁶ *Id.* at 13.

¹²⁷ *Id.* at 14 ("As such, the phrase 'filed any complaint' contemplates some degree of formality, certainly to the point where the recipient has been given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns.").

¹²⁸ *Id.*

¹²⁹ *Rosenfield v. GlobalTranz Enters. Inc.*, 811 F.3d 282, 285 (9th Cir. 2015).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

an important part of th[e] context.”¹³³ The court looked at the differences between managers and their employee counterparts in terms of job responsibilities.¹³⁴ Specifically, employers expect managers to disclose “work-related concerns” and to make suggestions for “changes in policy.”¹³⁵ Employers may not consider these reports to be “complaints” but rather the manager performing his or her normal duties and responsibilities.¹³⁶ On the other hand, when entry-level employees voice such concerns, employers would most certainly recognize such a report as a “complaint” since it is not a part of their duties to do so.¹³⁷

Therefore, the court held that in determining whether a managerial employee has filed a complaint, his or her role as a manager is an essential element of the analysis but is not the sole factor to be considered.¹³⁸ Looking at the fair notice rule established in *Kasten* and considering the managerial status of the plaintiff, the court held that the plaintiff’s advocacy of the rights of other employees could be considered by her employer as filing any type of complaint within the meaning of the FLSA.¹³⁹ The question of whether fair notice was given to an employer is determined “on a case-by-case basis.”¹⁴⁰ In terms of the managerial status of the employee, the court refused to create a bright-line rule in deciding whether a manager “filed any complaint” within the FLSA’s anti-retaliation provision.¹⁴¹

B. *Benefits of the Manager Rule*

There are numerous benefits and drawbacks to applying the manager rule in the Title VII context. In terms of the benefits, without the manager rule, some employees would have a basis for a retaliation claim just by performing their job

¹³³ *Id.* at 286 (internal quotation marks omitted).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 287.

¹³⁹ *Id.* at 288.

¹⁴⁰ *Id.* at 287 (“Because *Kasten* requires consideration of the content and context of an alleged FLSA complaint, the question of fair notice must be resolved on a case-by-case basis.”).

¹⁴¹ *Id.* at 284, 287 (“An employee’s managerial position is only one consideration . . .”).

responsibilities.¹⁴² Therefore, employers who are trying to discipline their employees for reasons unrelated to reporting discrimination claims could be frivolously sued.¹⁴³ This would make it very challenging for employers to discipline their employees without fear of being sued for retaliation.¹⁴⁴ Connected to this point is that without the manager rule, there would likely be an increase in the amount of retaliation claims brought under Title VII which, in turn, could “open up the litigation floodgates.”¹⁴⁵

Some have countered that being able to bring a retaliation claim is much different than being able to prove it.¹⁴⁶ To prevail under Title VII, employees would still have to establish a connection between the protected activity that they engaged in and the resulting adverse employment action that ensued.¹⁴⁷ Retaliation claims are the most difficult type of discrimination claims for employers to defend successfully, precisely because employees will most likely be able to establish the causation element of a retaliation claim.¹⁴⁸ In terms of an economic and financial aspect, without the manager rule, opening the

¹⁴² See Patrick Dorrian, *Should Special Retaliation Rule Apply to Managers, HR?*, BLOOMBERG: BNA (Jan. 29, 2016), <http://www.bna.com/special-retaliation-rule-n57982066739> (“[E]mployees might be able to build a retaliation claim just by doing their job, making it risky to discipline them when it's otherwise appropriate to do so.”).

¹⁴³ See *Tortifying Retaliation*, *supra* note 39, at 1401 (“Courts’ embrace of the manager rule reflects a legitimate concern that, without it, employers would lose the ability to supervise job performance for some segment of the workforce.”).

¹⁴⁴ *Id.* (“The fundamental problem driving the manager rule is that, when part of the employee’s job is to oversee compliance with anti-discrimination law, the search for a retaliatory motive cannot separate the illegitimate motive of retaliation from the legitimate motive of job performance.”).

¹⁴⁵ Dorrian, *supra* note 142; see also *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 628 (5th Cir. 2008) (“An otherwise typical at-will employment relationship could quickly degrade into a litigation minefield, with whole groups of employees—management employees, human resources employees, and legal employees, to name a few—being difficult to discharge without fear of a lawsuit.”).

¹⁴⁶ See Dorrian, *supra* note 142.

¹⁴⁷ See *id.*

¹⁴⁸ See *id.* (“Because these employees often are regularly engaged in taking or otherwise acting on bias complaints, an adverse action taken against them by their employer at any time might be seen—just from the close timing of events alone—as linked to that activity.”); see also Carol Patton, *Revisiting the ‘Manager Rule,’* HUM. RESOURCE EXECUTIVE ONLINE (Jan. 28, 2016), <http://www.hreonline.com/HRE/view/story.jhtml?id=534359834>, (“Retaliation claims are horrible in that it’s so easy to bring one and difficult to defend.”).

floodgates of litigation could result in large and significant costs to the employers even in situations where employers are not found liable and where monetary damages are not awarded.¹⁴⁹

C. Drawbacks of the Manager Rule

One drawback to the manager rule is that it might cause employees to be afraid of expressing their concerns about discrimination that they believe is occurring in the workplace,¹⁵⁰ creating a chilling effect. Another negative aspect of the manager rule is the “catch-22” scenario expressed in *DeMasters*.¹⁵¹ If the manager rule is applied in the Title VII context, then employees are more likely to remain silent which, in turn, would make victims of such discrimination less inclined to use internal investigation mechanisms already established in their workplaces.¹⁵² By not taking advantage of these mechanisms, employers would be able to use the *Faragher/Ellerth* defense¹⁵³ to escape liability, which could make for fewer successful claims and let them go unresolved.¹⁵⁴

Another drawback of the manager rule is that an affirmative defense has already been established for employers when employees do not utilize their employer’s internal investigation mechanisms.¹⁵⁵ Because solutions for employers, like the *Faragher/Ellerth* defense, have been created by the Supreme Court, excluding employees in a managerial position would defeat the purpose of even having those employer defenses.¹⁵⁶

¹⁴⁹ See Dorrian, *supra* note 142.

¹⁵⁰ See *DeMasters v. Carilion Clinic*, 796 F.3d 409, 423 (4th Cir. 2015) (“Applying the ‘manager rule’ in the Title VII context would discourage these very employees from voicing concerns about workplace discrimination and put in motion a downward spiral of Title VII enforcement.”).

¹⁵¹ *Id.* at 423; see also Dorrian, *supra* note 142 (“[R]equiring [employees] to choose between fulfilling their job duties and risking possible retaliation, or remaining silent and risking possible employer discipline for failing to carry out their job responsibilities.”).

¹⁵² *DeMasters*, 796 F.3d at 423.

¹⁵³ See cases cited *supra* note 88.

¹⁵⁴ *DeMasters*, 796 F.3d at 423; see also *Tortifying Retaliation*, *supra* note 39, at 1401 (“On the other hand, the manager rule tilts the scales all the way in the opposite direction, causing a complete withdrawal of retaliation protection from the employees assigned such job responsibilities, effectively removing them from Title VII’s antiretaliation exception to employment at will.”).

¹⁵⁵ *DeMasters*, 796 F.3d at 423.

¹⁵⁶ See *id.*

D. The Manager Rule Should Be Applied to Title VII Cases on a Case-by-Case Analysis

Requiring employees to “step outside” their roles as managers and file their own adverse action against their employer or assist other employees in asserting their rights¹⁵⁷ is too high a burden to bear. Instead, future courts should look to the Ninth Circuit’s reasoning in *Rosenfield* for guidance in applying the manager rule to retaliation claims under Title VII. First, as mentioned in *Rosenfield*, the Supreme Court’s fair notice rule established in *Kasten* should also be applied in the Title VII context.¹⁵⁸ Requiring that a complaint be clear and detailed will assist employers in understanding their employee’s complaints while simultaneously enabling employees to make those complaints.

Second, to protect the interests of both employees and employers, an employee’s managerial status should still be taken into consideration in deciding whether he or she can bring a retaliation claim under Title VII. One type of manager is not present in all types of employment.¹⁵⁹ Looking at the specific job responsibilities and duties of the manager will help in deciding whether he or she is filing a complaint under Title VII.¹⁶⁰ For example, an entry-level type manager may have the job responsibilities of solely overseeing the normal daily operations of a company and have no duties to report discrimination or compliance with federal statutes.¹⁶¹ On the other hand, a higher-level manager may be tasked with reporting such discrimination claims and ensuring that the company is complying with statutes such as the FLSA or Title VII.¹⁶² Therefore, courts should look at the exact job responsibilities of the plaintiff as part of their analysis.

Courts resolving retaliation claims under Title VII using a case-by-case analysis, which analyzes the job responsibilities of the employee and determines whether fair notice was given, would benefit both employers and employees. First, by looking at

¹⁵⁷ See, e.g., *McKenzie v. Renberg’s Inc.*, 94 F.3d 1478, 1486–87 (10th Cir. 1996).

¹⁵⁸ *Rosenfield v. Globaltranz Enters.*, 811 F.3d 282, 286 (9th Cir. 2015).

¹⁵⁹ *Id.* at 287 (“Moreover, an employee’s status as a ‘manager’ is not entirely binary.”).

¹⁶⁰ See *id.* at 286.

¹⁶¹ *Id.* at 287.

¹⁶² *Id.*

the job responsibilities of the plaintiff, courts could analyze whether the employee is really opposing the conduct of the employer that would make it oppositional, or whether the employee is simply performing the designated duties of his or her job description.¹⁶³ Second, if an employee is in fact found to have been opposing the conduct of an employer, the court could then look to see whether the employment practice being opposed is actually an unlawful employment practice under Title VII.¹⁶⁴

To aid in the analysis of a manager's retaliation claim under Title VII, courts should adopt the fair notice rule established in *Kasten*: A complaint must be clear and adequate so that a reasonable employer would be able to understand that the complaint is asserting rights that are protected by the statute and that the complainant is "call[ing] for their protection."¹⁶⁵ Courts should also look to the guidance of *Rosenfield* and consider the managerial status of employees as a significant element of the case-by-case analysis.¹⁶⁶ This type of analysis would also benefit employers by potentially limiting the "litigation minefield"¹⁶⁷ that would ensue without the application of some type of manager rule, while simultaneously allowing employees to have their claims heard and recognized.

CONCLUSION

The manager rule should be applied to Title VII cases but in a very specific context involving a case-by-case analysis, similar to that of the Ninth Circuit's reasoning in *Rosenfield v. GlobalTranz Enterprises, Inc.* With the rise in retaliation claims, neither employees nor employers should have a significant advantage over the other. On the one hand, the ability to file claims for retaliation under Title VII should not be a more onerous task for employees in a managerial role. They should not have to demonstrate that they have stepped outside their normal role of being a manager to an employee who has personally filed an adverse employment action against their employer. Doing so may discourage employees from voicing their concerns about discrimination in the workplace.

¹⁶³ See Dorrian, *supra* note 142.

¹⁶⁴ See *id.*

¹⁶⁵ *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14 (2011).

¹⁶⁶ *Rosenfield*, 811 F.3d at 286.

¹⁶⁷ *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 628 (5th Cir. 2008).

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On the other hand, not having the manager rule apply to Title VII cases would have employers potentially faced with opening the floodgates of litigation with retaliation claims. Employees could essentially be engaging in protected activity for doing their normal job activities. Therefore, employers would have a difficult time trying to discipline their employees for reasons unrelated to their responsibilities of reporting job bias or discrimination complaints.

There is a way to satisfy both parties. The proposed solution of adopting the Supreme Court's fair notice rule for complaints in *Kasten*, considering the managerial status as only one part of the context as established in the Ninth Circuit's opinion in *Rosenfield*, and conducting a more detailed and factual analysis would satisfy both employees and employers in relation to retaliation claims under Title VII.